IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-582

CITY OF PITTSBURGH,

Petitioner,

v.

ALCO PARKING CORPORATION, *et al.*,

Respondents.

ON CERTIORARI FROM THE
SUPREME COURT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

Now come the Council for Private Enterprise, American Consulting Engineers Council, American Society of Consulting Planners, American Society of Association Executives, Electronic Industries Association, Legislative Council for Photogrammetry, National Association of River and Harbor Contractors, National Council of Professional Services Firms, National Council of Technical Service Industries, National Employment Association, National Parking Association and Shipbuilders Council of America, and respectfully request that this Honorable

Court grant permission for the filing on their behalf of the brief *amicus curiae* accompanying this motion.

Petitioners are national organizations, all concerned with unfair competition by government at all levels. The specific interest of each organization is set forth in more detail in the brief accompanying this motion.

Because the petitioners are national organizations representing important segments of the private sector, they are in a position to discuss and document the significant implications of the issues in this case for the private enterprise system. A large number of the member firms of the associations participating in the filing of this brief *amicus curiae* experience direct competition from governmental entities. Petitioners are concerned that were the gross receipts tax imposed by the City of Pittsburgh to be upheld by this Court, there would be no restraint upon the power of government to tax its private sector competitors out of business. This tax, in our view, is so fundamentally unfair to private enterprise as to constitute a confiscatory taking under the Fifth and Fourteenth Amendments of the Constitution. Petitioners intend to present public policy and legal arguments in support of this conclusion.

Petitioners requested consent to the filing of a brief *amicus curiae* from all parties to this proceeding but consent was refused by the City of Pittsburgh.

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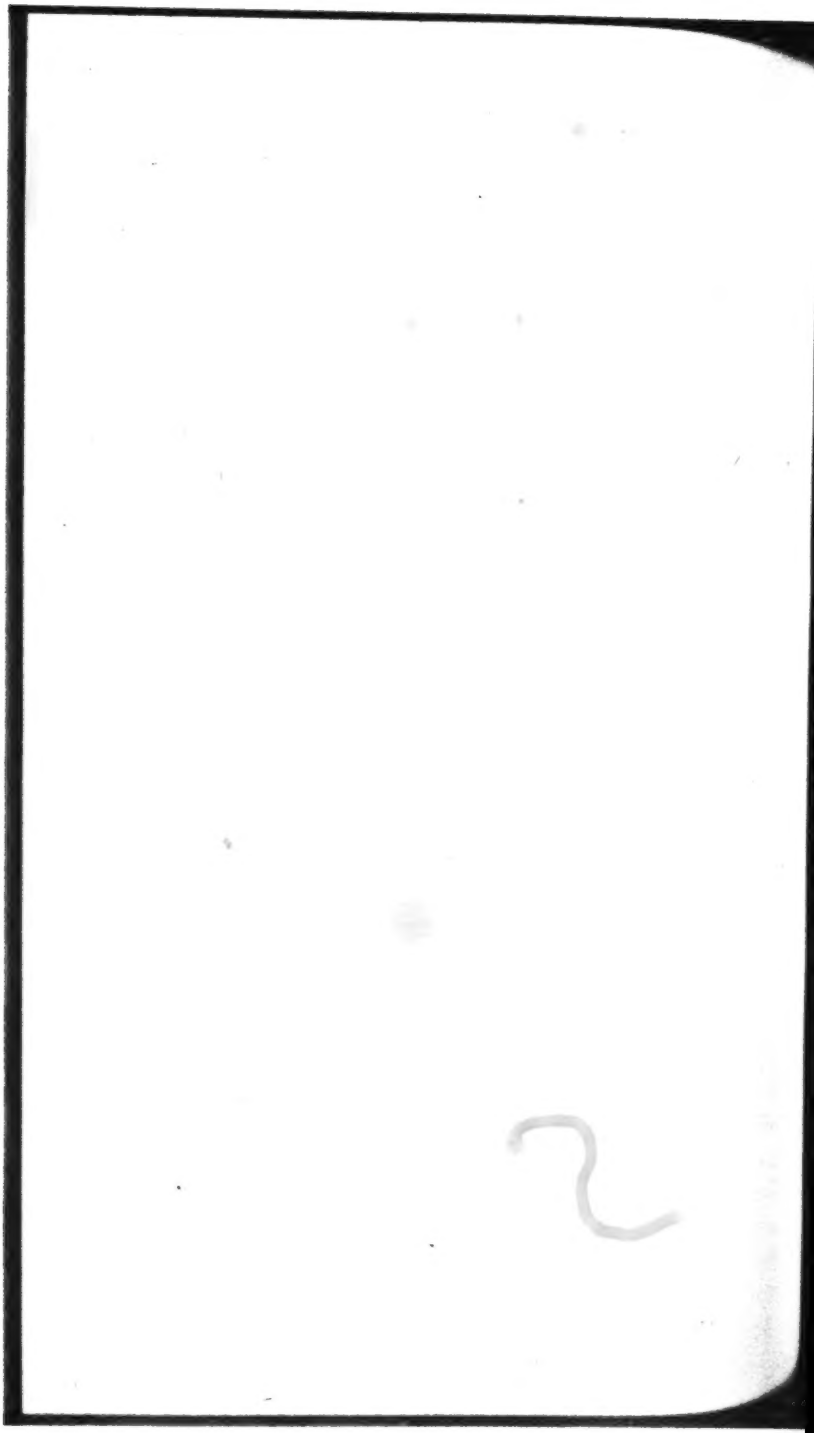

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BRIEF OF THE COUNCIL FOR PRIVATE ENTERPRISE, ET AL.

The Council for Private Enterprise and its constituent associations which have joined in this brief represent a broad spectrum of American industry engaged in a variety of industrial and commercial activities. In performing these activities the membership of each of these associations is confronted with significant direct competition from government and its instrumentalities. These associations and their individual members thus share a common interest in the development of laws and policies which restrain unfair competition between government and private enterprise. Amici are concerned that the

unreasonable gross receipts tax imposed by the City of Pittsburgh on private parking garages with which it is in direct competition would, if upheld by this Court, establish a precedent for similar abuse of sovereign powers by Federal, state or other local governmental entities acting in an enterprise capacity in direct competition with private sector firms.

THE INTEREST OF THE AMICI

The Council for Private Enterprise

The Council for Private Enterprise brings together numerous professional associations which have a common interest in strengthening private enterprise. The member firms of these associations engage in a broad range of industrial and commercial activities. Over the years, the private companies which are members of these associations have had substantial experience providing products and services in competition with government enterprise. The difficulties encountered in establishing the proper role for utilization of private sector capabilities have resulted in the Council for Private Enterprise defining the following specific objectives: 1) endeavoring to reduce or eliminate unjustified government incursions into commercial-industrial activities, 2) discouraging the initiation of new activities in areas where capabilities exist in the private sector, 3) informing the Congress, government agencies, and other interested parties of the extent and growth of such government activities in an effort to develop policies which will strengthen government reliance on private enterprise and assure appropriate limitations upon unfair government competition with the private sector.

The Council for Private Enterprise and its constituent associations believe that affirmance of the decision of the Supreme Court of Pennsylvania is necessary if unfair

government competition with the private sector is to be restrained.

American Consulting Engineers Council

The American Consulting Engineers Council, previously the Consulting Engineers Council of the United States, was founded in 1910 and consists of 2700 consulting engineering firms located in each of the fifty states. The Council was formed to assist its members in achieving higher professional, business and economic standards; to promote the professional and economic welfare of its members; to advise on enactment of legislation on a national basis affecting the interest of consulting engineers; to assist its members on state and local legislation that may have a relation to the general interest of the Council; and to provide general support and assistance in the advancement of the science and practice of engineering.

Private sector consulting engineering firms experience significant competition from in-house government staffs at all levels, both in providing engineering services for the government's own use and in providing services to the general public. The American Consulting Engineers Council has for several years sought reform in laws and policies to require maximum reliance on private sector capability in the engineering field and to minimize unfair government competition. This case has vital significance for the continued success of this effort.

American Society of Consulting Planners

The American Society of Consulting Planners was established in March 1966 in response to the particular needs of consulting planners. Currently, the membership includes 100 private sector consulting planning firms located in nearly every state in the United States. The consultant services provided by these firms include urban

planning, environmental planning, transportation planning, and the like.

The purpose of the Society is to advance the public welfare through the recognition and encouragement of the private practice of planning and to establish and enforce standards of technical and ethical performance in order to guide activity of firms which are engaged in such private planning.

Private sector consulting planners experience substantial direct competition from government at all levels, but particularly local, regional and state governments. In-house staffs frequently perform work for which there is adequate private sector capability; often these services are provided to other governmental units in direct competition with private sector firms. The Society and its members thus have an immediate interest in the formulation of legal rules to regulate such government competition.

American Society of Association Executives

The American Society of Association Executives is a nonprofit corporation founded in 1920 and incorporated in the District of Columbia. Its membership of 5000 individuals includes primarily full-time staff personnel engaged in the management of trade, professional, technical, educational, philanthropic or business associations.

A substantial number of the members represent industry associations which are directly concerned with limiting unfair government competition with private enterprise. The continued vitality of the industries represented by these associations requires judicial, legislative and administrative action to curb unfair competitive practices by government at all levels. This case therefore raises important legal and economic issues which affect all of these industries.

Electronic Industries Association

The Electronic Industries Association, originally founded in 1924 as the Radio Manufacturers Association, is the national industrial organization of electronic manufacturers in the United States. Its membership consists of approximately 280 electronic manufacturing firms.

The Association supports and strives to advance the defense of our country, the growth of our economy, the progress of technology, and all interests of the electronics industry compatible with the public welfare.

Under policy direction of its Board of Directors and operating through its various product groups, service departments, committees, and staff, the Association:

Stimulates public awareness of the vital role of the electronics industry in national defense, space exploration, communication, education and entertainment, the evolution of industrial technologies, the improvement of living standards, and the rise in the Gross National Product;

Coordinates and conveys the views of Association members to appropriate bodies on legislation and governmental regulations;

Cooperates with other associations of industry in areas of common interest to eliminate duplication of effort;

Promotes and stimulates our free enterprise system and vigorously supports our national policies for maintaining and preserving this system.

A substantial number of the members of EIA provide technical and support services in direct competition with government agencies. Competition with the private sector by government agencies has been a cause of grave concern for many years. During the past three decades the exigencies of the times have led to expansion of government in-house activities as well as mobilization of

industrial capability. Often these government activities were not cut back after the original need passed. These in-house commercial and industrial activities continue today without proper re-examination. Commercial organizations in industry thus find themselves competing with extensive Federal in-house activities.

Legislative Council for Photogrammetry

The Legislative Council for Photogrammetry is a national organization of 45 private firms practicing photogrammetric engineering. Organized in 1962, the Council is dedicated to promoting greater use of private firms to perform the necessary photogrammetric services required by the Federal, state and local governments. The membership experiences significant direct competition from government, in particular the U.S. Army Corps of Engineers and the U.S. Coast and Geodetic Survey. The Council thus has a direct interest in laws and policies which restrict unfair competitive actions by government and its instrumentalities.

National Association of River and Harbor Contractors

The National Association of River and Harbor Contractors was founded in 1937. Its 28 member firms provide engineering, dredging and other services both in this country and abroad. These services are provided in direct competition with such government agencies as the U.S. Coast Guard and the U.S. Army Corps of Engineers.

The objectives of the National Association of River and Harbor Contractors are to protect, promote, foster and advance the interest of its members by, *inter alia*, protecting the industry against unfair and unjust burdens. Unfair government competition, such as that presented in this case, is of direct concern to this industry. The

Association supports a ruling that would limit the ability of government to compete unfairly.

National Council of Professional Services Firms

The National Council of Professional Services Firms is an incorporated association formed in 1971 to seek reform of laws and policies which create unfair preferences for not-for-profit and in-house government sources in providing professional services to the government. The Council's membership includes seven associations representing particular segments of the professional services industry as well as over five hundred individual firms.

The professional services industry represented by the Professional Services Council consists of for-profit private sector firms engaged in research and development, testing, design and consulting work for clients in both the private and public sector. The industry today, about $11 billion in size and composed of over 11,000 firms, is one of the largest in the United States. It includes management consultants, systems analysts, computer software firms, testing laboratories, research and development firms and many specialty firms engaged in social studies, environmental studies, transportation studies, and other special study areas. Currently, approximately half of the industry's activity involves performing services for Federal, state and local governments; in addition, the industry in performing work for both the public and private sector faces direct competition from government instrumentalities providing similar services.

The professional services industry is concerned about the tendency of government at all levels to compete unfairly in performing professional services for which there is adequate available private sector capability. It is the view of the Council that laws and policies should require reliance on private sector firms to the extent such firms are qualified to perform work for government

agencies in order to achieve efficiencies in meeting governmental objectives, and that government instrumentalities providing professional services to the public should be required to compete on an equal basis.

National Council of Technical Service Industries

The National Council of Technical Service Industries (NCTSI) is a nonprofit association of major corporations which provide, by contract, a wide variety of support services required by government agencies in carrying out their assigned missions and programs. NCTSI was formed in 1965 to reverse a build-up of in-house government support service activities and to direct public attention to the failure of government agencies to implement the bipartisan national policy of reliance on private enterprise.

These support service activities total approximately $20 billion annually. They include a wide range of activities required by the Department of Defense, National Aeronautics and Space Administration, Department of Transportation, and several other agencies. Currently approximately $11.5 billion of this annual cost is performed in-house by Federal personnel and $8.5 billion is performed by private industry, including a significant portion performed by NCTSI members.

In our present economy, where more than sixty percent of the working force is engaged in service-type industries and where the private sector provides these services in a competitive environment, government should rely upon the private sector to supply its support service needs to the same extent that it now relies upon private industry to supply its product requirements. Despite a long-standing bipartisan expression of national policy that government rely upon the private sector to perform required services, that policy has not been effectively implemented. The trend, in fact, has been the reverse:

activities provided by contract with industry have in numerous instances been converted to in-house performance.

The National Council of Technical Service Industries is wholly dedicated to reversing this trend and maximizing government reliance upon industry for support service requirements.

National Employment Association

The National Employment Association was founded in 1960. Its membership includes corporations, companies, partnerships, and individuals engaged in providing employment services.

The objective of the Association is to create a better understanding, acquaintance, coordination and cooperation among employment services; to increase the efficiency of the agency service by the promotion of effective methods for serving employers and job applicants, by the consideration of the relations between employers and employees, and by the investigation and study of industrial and economic conditions; and to amply protect its members against all acts, methods and practices inimical to the best interests of the service.

Our membership is concerned with the tendency of government at all levels to build up unnecessary in-house civil service capability where adequate private sector capability is available.

National Parking Association

The National Parking Association is an incorporated association whose purpose is to promote the welfare and protect the interest of the commercial off-street parking industry. National Parking Association's membership consists principally of parking operators, parking consultants and suppliers to the parking industry.

The parking industry is handicapped by government competition at the municipal level. Municipal facilities are generally constructed with money borrowed under favorable conditions available only to government; they are usually free from the taxes levied against competing commercial facilities; because municipal facilities do not have to make a profit, they are generally operated at rates below economically feasible commercial rates; municipal facilities do not bear all normal costs of doing business: for example, in many cases bookkeeping may be a centralized municipal function, and snow removal is performed by the city. Such advantages as these make it difficult for private enterprise to compete on an equal basis.

Further, under the urban renewal program, the Federal government assumed a role in financing municipal parking by permitting a city to contribute a parking facility to a renewal project in lieu of the city's matching share of cash. Currently, general revenue sharing funds are being utilized to construct public parking facilities in some cities.

The National Parking Association and its membership thus have a direct interest in laws and policies which require government, where it competes with the private sector, to do so on an equitable basis.

Shipbuilders Council of America

The Shipbuilders Council of America is a voluntary, non-profit, unincorporated national trade association established originally in 1921 as the National Council of American Shipbuilders. The present name was adopted in 1943.

The purposes of the Council are (a) to inform its members of economic, governmental, industrial, legislative and judicial developments affecting the shipyard industry of the United States, either directly or indirect-

ly; (b) to promote the maintenance of a sound private shipbuilding and ship repair industry in the United States; and (c) to improve conditions under which the operations of the industry are carried on.

In pursuit of these objectives, the Council has for nearly four decades dealt with an ever-present problem of competition from government-owned and operated naval shipyards whose costs are demonstrably higher than costs in privately-owned, commercially-operated shipyards. National policy has reluctantly taken cognizance of this cost disparity, and, as a consequence, virtually all new naval ship construction is now placed with lower cost private yards. However, naval yards retain the majority of Navy ship repair, alteration and overhaul work for which there is adequate private enterprise capability which could perform these tasks more efficiently.

Summary of Argument

Since the briefs of the parties fully set forth the underlying facts and the course of the proceedings below, amici will not repeat them in detail here. Amici will instead highlight the extreme action which the City of Pittsburgh has taken in imposing a 20% gross receipts tax upon its direct competitors and the importance of establishing constitutional limits to such action under the Takings Clause.

At the time of suit the Public Parking Authority of the City of Pittsburgh ("Parking Authority") controlled approximately 25% of the off-street parking spaces in the downtown area of the city; the remaining 75% were owned and operated by private operators. City of Pittsburgh Ordinance No. 704 of 1969 (P.103a)[1] ("Park-

[1] Amici, for purposes of convenience, adopt the designations to the record used by the parties. Thus references designated by "P.___ a" are to the pages of the Appendix to the Petition for Certiorari filed by the City of Pittsburgh October 1, 1973.

ing Tax Ordinance") imposed a tax of 20% of gross receipts from parking transactions upon operators of commercial off-street parking facilities. This case, then, does not concern a revenue measure affecting the business community generally, but rather an inordinately high gross receipts tax selectively imposed by the City of Pittsburgh upon commercial garages with which the Parking Authority is in direct and substantial competition. The respondent parking garages have challenged the constitutionality of this tax, alleging *inter alia* that the excessive and unreasonable 20% rate, in view of the direct competition at lower rates from the Parking Authority, substantially eliminated the profitability of their parking garage business and would force the vast majority of commercial parking garage owners and operators in downtown Pittsburgh out of business. The court below held that under the circumstances the 20% tax constituted a confiscatory taking in violation of the Fourteenth Amendment to the United States Constitution.[2] In so holding the court placed great emphasis upon the impact of the direct, substantial and favored competition from the Parking Authority.

The issue before the court was not whether the 20% rate by itself was unconstitutional, but whether in view of the competitive circumstances the selective tax assessed by the City of Pittsburgh imposed such a substantial economic burden upon commercial parking facility operators that an unconstitutional taking had occurred. The court correctly phrased the issue presented as follows:

> This controversy presents the interesting and novel question whether the enactment, by a municipal government, of a 20 percent gross receipts tax upon all non-residential, commercial parking facilities in

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[2] Alco Parking Corporation v. City of Pittsburgh, 453 Pa. 245, 307 A.2d 851 (1973).

> that municipality, combined with direct government competition in the form of a public parking authority, charging lower rates, has resulted in an unconstitutional taking and confiscation of private property without due process of law.[3]

The most significant factor considered by the court in finding a confiscatory taking was the fact that the City of Pittsburgh was acting in direct competition with private industry and enjoyed an extraordinary competitive advantage by reason of its tax exemptions and access to public financing and subsidies:

> Clearly the City of Pittsburgh is acting in an enterprise capacity by operating a publicly financed parking lot which competes with private industry. To the extent that the Public Parking Authority has gained an unfair competitive edge over private parking lot owners through tax exemptions and lower rates, and more importantly appropriated an unreasonable proportion of their revenues via the gross receipts tax, a taking requiring just compensation has occurred. In the absence of any compensation a taking without due process of law results.[4]

It is clear that this factor of favored and unfair government competition with private enterprise was critical to the decision of the court below, and that the same issue is before this court. As the court below noted:

> This government enterprise competing with private industry adds not only a new and most significant dimension to the traditional constitutional problem of what constitutes a taking without due process but also an impermissible one.[5]

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[3] 307 A.2d at 853.

[4] 307 A.2d at 863, 864 n.14.

[5] 307 A.2d at 864.

This Court's resolution of the issues presented in this case will thus have a significant impact in the numerous areas of our economy where government and the private sector compete.

At the outset amici must take serious issue with the erroneous and misleading suggestion of the City of Pittsburgh that the decision below, if upheld, would destroy the ability of government to serve the public by requiring government either to forego levying taxes or providing services wherever government and the private sector compete. The decision below does not question the *authority* of the government to compete with private enterprise or to tax its competitors, but rather the exercise of the taxing power in this case. It merely limits the excessive and unreasonable tax selectively imposed by the City of Pittsburgh upon its private sector competitors.

The extreme tax imposed by the City of Pittsburgh constitutes arbitrary government action which must be restrained. The major role of the government in the economy makes the formulation of constitutional rules to assure fair treatment of all competitors of basic importance to the health of the United States economy. As the size of government at all levels has dramatically increased over the last several decades, competition between government and the private sector in the provision of goods and services has become a widespread phenomenon. This competition is not confined, as the City of Pittsburgh has suggested, to traditional public service activities but extends into numerous industrial, utility, distribution and service activities that have traditionally been performed by the private sector. The government competitor enjoys several inherent competitive advantages flowing from tax exemptions, low-cost public financing, direct and indirect subsidies, and various other attributes and privileges of the sovereign. Unre-

strained government competition would present a significant threat to the efficient use of private sector resources with ominous implications for the viability of the private enterprise system.

The importance of enforcing constitutional limits upon the legislature's exercise of the taxing power has been established since this Court's decision in *McCulloch v. Maryland*.[6] Courts are obliged under the Constitution to invalidate taxing measures so excessive and burdensome as to amount to a confiscatory taking. Where the tax upon a private sector firm is intertwined with the presence of direct, favored competition from the government, its adverse impact is substantially enhanced. This Court has been sensitive to the need to limit government action, such as that presented here, which adversely affects the competitive position of private firms. For example, the Supreme Court has rejected the prior doctrine that an aggrieved competitor *qua* competitor lacked standing to challenge government action which worked to its detriment. Similarly, efforts to induce anticompetitive actions by government acting in an enterprise capacity have been held subject to the antitrust laws, in recognition of the enormous economic impact of government commercial-industrial activities. It is thus appropriate, as the court below noted, for this same factor of government competition with private enterprise to require invalidation under the Takings Clause of an extreme tax selectively imposed upon a small group of private companies with which the taxing body was in substantial, direct and favored competition.

Construing the Takings Clause to prohibit this extreme tax is consistent with the original intent of the Clause as well as this Court's decisions applying the Takings Clause

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[6] 17 U.S. (4 Wheat.) 316 (1819).

to specific government actions selectively imposing excessive burdens upon particular individuals or companies. This construction would further reflect a long-standing public policy to curtail unfair government competition with the private sector, a policy reflected most prominently in Federal laws and policies which seek to limit government commercial and industrial activity. This traditional public policy is expressed in the very Pennsylvania statute pursuant to which the Parking Authority has been created, which states in clear and unequivocal terms the objective of minimizing unfair government competition with the private sector.

Where government, acting in its sovereign capacity, levies a selective and excessive tax upon private sector firms with which it is in direct competition, strict judicial scrutiny is imperative. The instant case presents substantial involvement by a municipal authority in a commercial enterprise for which there is significant private sector capability; significant favoritism and privileges bestowed upon this authority, in the form of tax exemption, low-cost public financing, and the like, which permit it to undercut its private sector competitors; a devastating impact from the burdensome and selective tax upon direct competitors in the private sector; and the clear policy of the Pennsylvania legislature that public parking authorities should not compete unfairly. Were this Court to uphold this excessive and selective tax despite the demonstrated adverse impact on government's private sector competition, there would be no constitutional restraint upon the power of government at any level to expand its enterprise activity unfairly by taxing its private sector competitors out of business. Under the circumstances presented, therefore, this Court can draw but one conclusion: the Parking Tax Ordinance effects a confiscatory taking.

ARGUMENT

The Fifth Amendment to the Constitution of the United States reads in relevant part as follows:

> nor shall private property be taken for public use, without just compensation.[7]

In the instant case this Court should apply this fundamental constitutional limitation to invalidate the excessive and unreasonable gross receipts tax selectively imposed by the City of Pittsburgh upon its direct competitors in the private sector. For the reasons stated below, amici respectfully submit that this tax constitutes a confiscatory taking of the property of respondents in violation of their constitutional rights.

I.

COURTS ARE OBLIGED UNDER THE TAKINGS CLAUSE TO STRIKE DOWN CONFISCATORY TAXES

Before addressing this basic constitutional issue amici are compelled to clarify certain questions which the City of Pittsburgh has raised in an apparent effort to divert attention from the real issues in this case.

The City of Pittsburgh asserts that invalidation of the selective and burdensome gross receipts tax imposed by the City of Pittsburgh upon its direct competitors violates the proper separation of powers and is thus an inappropriate exercise of the power of judicial review vested by the Constitution in the Judicial Branch. It further suggests that the holding below somehow threatens to

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[7]This provision is made applicable to the states and their instrumentalities by the Due Process Clause of the Fourteenth Amendment. Chicago B&Q R.R. v. Chicago, 166 U.S. 226 (1897). Throughout amici refer to this restraint upon the actions of the Federal and state governments and their instrumentalities as the Takings Clause.

"create a devastating crisis in the courts"[8] through creation of a radically new doctrine that exercise of the taxing power is subject to constitutional restraint. Each of these contentions is directly refuted by this Court's prior decisions.

A. The Takings Clause Limits Abuse of the Taxing Power

The doctrine that the legislature's exercise of powers of taxation is subject to this Court's interpretation of the Constitution has been well-established since the decision in *McCulloch v. Maryland*.[9] While petitioner quotes at length from the voluminous dicta in the *McCulloch* opinion, it fails to note that the state tax before the Court in that case was held unconstitutional. This decision firmly established the propriety of judicial invalidation of unconstitutional taxes levied by state governments and their instrumentalities; Chief Justice Marshall's discussion of this power of judicial review is directly pertinent here:

> . . . But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of the argument admit that the sovereignty of the state, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled by that instrument must be a matter of construction.

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[8] Brief for Petitioner at 20.

[9] 17 U.S. (4 Wheat.) 316 (1819).

> If we apply the principle for which the State of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of the instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states.[10]

Justice Holmes' dissenting opinion in *Panhandle Oil Co. v. Mississippi ex rel. Knox*[11] places those portions of the *McCulloch* opinion upon which petitioner seeks to rely in the context required by an intervening century of judicial construction of the Constitution:

> It seems to me that the state court was right. I should say plainly right, but for the effect of certain dicta of Chief Justice Marshall which culminated in or rather were founded upon his often quoted proposition that the power to tax is the power to destroy. In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the states had any power it was assumed that they had all power, and that the necessary alternative was to deny it altogether. *But this court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits. The power to fix rates is the power to destroy if unlimited, but this court while it endeavors to*

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[10] 17 U.S. at 427, 431, 432.

[11] 277 U.S. 218 (1928).

prevent confiscation does not prevent the fixing of rates.[12]

This judicial authority to determine whether taxing measures, including rates of taxation, comport with the Takings Clause is well-recognized. *Acker v. Commissioner of Internal Revenue,*[13] for example, is one of numerous cases in which courts have considered claims that the rate of taxation imposed by the Federal income tax violates the Takings Clause. In *Acker,* the court in reliance upon the Holmes' dissent in *Panhandle Oil Co.* held that such a challenge to the progressive rate structure was properly

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[12]277 U.S. at 223 (Emphasis added). *Compare* the opinion of Chief Justice Burger for the Court in Cole v. Richardson, 405 U.S. 676, 685, 686 (1972):

> Those who view the Massachusetts oath in terms of an endless "parade of horribles" would do well to bear in mind that many of the hazards of human existence that can be imagined are circumscribed by the classic observation of Mr. Justice Holmes, when confronted with the prophecy of dire consequences of certain judicial action, that it would not occur "while this Court sits". Panhandle Oil Co. v. Mississippi, 277 U.S. 218, 223 (dissenting).

See also National Cable Television Association, Inc. v. United States, 42 U.S.L.W. 4306 (U.S. March 4, 1974), invalidating excessive charges imposed by the Federal Communications Commission upon private sector firms subject to its jurisdiction. The Court noted:

> Chief Justice Marshall is credited with the statement that "the power to tax is the power to destroy" (See Panhandle Oil Co. v. Knox, 277 U.S. 218, 223) to which Mr. Justice Holmes replied, "The power to tax is not the power to destroy while this Court sits." Ibid.

42 U.S.L.W. at 4307 n. 4.

See also Federal Power Commission v. New England Power Co., 42 U.S.L.W. 4308 (U.S. March 4, 1974).

[13]258 F.2d 568 (6th Cir. 1958), *aff'd* 361 U.S. 87 (1959).

before the court. *Swallow v. United States,*[14] *United States v. Keig,*[15] and *United States v. Acker*[16] are to the same effect.

Thus this Court's review of the Parking Tax to determine whether it effects a confiscatory taking is proper under, and in fact required by, the Constitution.

B. This Case Concerns a Particular Exercise of the Taxing Power, Not the Basic Authority of Government to Tax or to Compete

Petitioner has advanced a "parade of horribles" in arguing that the decision below "threatens to destroy the ability of government to serve the public."[17] This assertion reflects a fundamental misconception of the issues presented in this case and the nature of the specific government action involved.

Respondent parking garages do not contend that the Public Parking Authority of Pittsburgh somehow transgresses the Takings Clause by the mere act of engaging in competition with the private sector. Nevertheless petitioner attempts to buttress its argument with numerous citations to decisions holding that the Takings Clause does not establish a blanket prohibition against government competition with the private sector.[18] Each of these cases concerns a challenge to the *authority* of a public instrumentality to operate municipal garages in competi-

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[14]325 F.2d 97 (10th Cir. 1963), *cert. den.* 377 U.S. 951 (1964).

[15]334 F.2d 823 (7th Cir. 1964).

[16]415 F.2d 328 (6th Cir. 1969), *cert. den.* 396 U.S. 1003, *reh. den.* 397 U.S. 958 (1970).

[17]Brief for Petitioner at 32.

[18]*See* Jayne v. City of Detroit, 348 U.S. 802 (1954); Gate City Garage v. Jacksonville, 66 So.2d 653 (Fla. 1953); Bowman v. Kansas City, 361 Mo. 14, 283 S.W.2d 26 (1950).

tion with private businesses; in none was the court called upon to evaluate the propriety of a selective tax aimed at its private competitors once government had commenced competition.

Similarly the City of Pittsburgh relies heavily upon *Puget Sound Power & Light Co. v. Seattle*[19] a decision which speaks solely to the propriety, under the Takings Clause, of *any* taxation of private businesses with which it competes. The petitioner in *Puget Sound* argued that the imposition of such a tax constituted a per se violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The Court characterized this argument as follows:

> As appellant asserts that the tax can impose no effective burden on the city, its contention is, in effect, that the city, by virtue of the Fourteenth Amendment, upon entering the business forfeited its power to tax any competitor.[20]

Accordingly *Puget Sound* upholds the constitutional authority of government to impose nonconfiscatory taxes upon its competitors. It is instructive that both *Puget Sound* and its companion case, *Seattle Gas Co. v. Seattle,*[21] arose upon a demurrer of the City of Seattle to the respective complaints.[22] Thus the court was not

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[19]291 U.S. 619 (1934).

[20]291 U.S. at 623, 624.

[21]291 U.S. 638 (1934).

[22]The Supreme Court of Washington in its opinion thus addressed the question whether, under the circumstances, a municipality would be estopped from exercising its taxing power and concluded to the contrary. Puget Sound Power & Light Co. v. Seattle, 172 Wash. 668, 21 P.2d 727 (1933); Seattle Gas Co. v. Seattle, 172 Wash. 701, 21 P.2d 732 (1933).

presented with a factual record detailing the combined impact of government competition and the selective tax upon private sector competitors.[23]

While government competition may be permissible and taxation by government of its competitors may be permissible, no prior decision of this Court upholds an excessive tax selectively imposed by a government upon private sector firms with which it is in substantial, direct and favored competition. In reviewing the gross receipts tax imposed by the Parking Tax Ordinance in the context of favored competition at lower rates from the Public Parking Authority, therefore, this Court must address but one precise question: under what circumstances is a tax selectively imposed upon a government's direct competitors so arbitrary, unreasonable and burdensome as to constitute a compensable taking.

C. A Selective and Excessive Tax Upon a Government's Direct Private Sector Competitors Requires Close Scrutiny

Where direct competition between the government and private sector firms exists, and the government selectively

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[23]Pittsburgh's reliance upon Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869) is misplaced for that case did not involve government competition with the private sector. The national banking associations which were favored by the tax in question were private corporations, not Federal instrumentalities. Veazie Bank is but one in a long line of cases establishing that a taxing authority may make reasonable distinctions among members of the private sector. In Veazie Bank the rational basis for distinction arose from the Federal interest in a uniform national currency, which provided an independent basis for upholding the tax in question. 75 U.S. (8 Wall.) at 548.

Rapid Transit Corp. v. New York, 303 U.S. 573 (1938), similarly confirms the propriety under the Equal Protection Clause of reasonable distinctions among private businesses in imposing tax burdens, and does not speak to the issue of unfair competition presented in the instant case.

imposes a heavy tax upon its private sector competitors, substantial questions as to the intent and effect of the government action are inevitably presented which require close judicial scrutiny. While the tax upon private sector firms may be an exercise of sovereign power, in the context of direct and favored government competition such a sovereign act may have the effect, whether intended or not, of substantially enhancing the unfair competitive advantages enjoyed by government acting in an enterprise capacity. This added factor of direct government competition thus requires a careful and thorough judicial inquiry into the particular circumstances and impact of a selective tax upon government's private sector competition; absent such scrutiny, government would be in a position to utilize its sovereign powers to unfair competitive advantage.

This case presents a particular set of circumstances which (unless the position espoused by the City of Pittsburgh were to be endorsed) lies at the extremes of government utilization of sovereign powers for unfair competitive advantage. The 20% gross receipts tax imposed by the City of Pittsburgh is not a revenue measure imposed upon the business community at large or upon the general public, but rather an assessment confined to one small and circumscribed group, commercial parking garage owners and operators within the City of Pittsburgh.[24] The Parking Authority is currently

[24]Technically, the tax was also imposed upon the Parking Authority. City of Pittsburgh v. Public Parking Authority of Pittsburgh, No. 97 C.D. 1973 (Pa. Cmwlth. Jan. 14, 1974) held, however, that the broad exemption from taxes enjoyed by the Parking Authority extends to the gross receipts tax. A petition for allowance of appeal from this ruling by the City of Pittsburgh is currently pending before the Supreme Court of Pennsylvania. It should be noted that the court below in the instant case did not rely upon such a tax exemption for the Authority, recognizing that "Even if the Authority had to pay the tax to the City it would

in direct competition with this group; by controlling 25% of the total spaces available in the downtown area it has achieved significant market power; and it has availed itself of numerous competitive advantages accruing solely by reason of its public enterprise status to charge rates substantially lower than the commercial garages.[25] The disastrous economic impact of this favored competition and the inordinately high tax drawing twenty cents of every dollar taken in by the private firm into the municipal treasury is well-documented.

The added factor of government competition with the private sector distinguishes *Magnano Co. v. Hamilton*[26], upon which petitioner bases much of its argument. The margarine industry impacted by the tax at issue in *Magnano* was not faced with competition from government. Where such competition exists, the ramifications of burdensome and selective tax measures are much more complex and present a far greater likelihood that a confiscatory taking of property may have occurred. The court below, in distinguishing its prior decisions in *Philadelphia v. Eglin's Garage*[27] and *Philadelphia v. Samuels*,[28] both decided several years before munici-

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mean only in reality an accounting transaction, transferring dollars from one pocket of an instrumentality of city government to another." 307 A.2d at 861 n. 9.

[25]The Parking Authority was formed by a city ordinance (PA. STAT. ANN. Tit. 53 §344) and its entire Board is appointed by the Mayor (PA. STAT. ANN. Tit. 53 §348). The Parking Authority Law provides for transfer of all Authority assets to the city upon termination of existence (PA. STAT. ANN. Tit. 53 §354). The Supreme Court of Pennsylvania, construing state law, thus treated the Parking Authority and the City as one for purposes of this case. This construction of Pennsylvania law is controlling here.

[26]292 U.S. 40 (1934).

[27]342 Pa. 142, 19 A.2d 845 (1941).

[28]338 Pa. 321, 12 A.2d 79 (1940).

palities in Pennsylvania were even authorized to establish public parking authorities, quite properly recognized the significant implications of such direct government competition and the need for courts to scrutinize the particular circumstances and impact of the related exercise of the sovereign power to tax competing private sector firms.

II.

THE PUBLIC INTEREST IN PRESERVING A VIABLE SYSTEM OF PRIVATE ENTERPRISE REQUIRES JUDICIAL LIMITS ON THE GOVERNMENT'S EXERCISE OF SOVEREIGN POWERS TO GAIN AN UNFAIR COMPETITIVE ADVANTAGE.

The dramatic increase in government enterprise activities in direct competition with private sector firms is a major development with the most serious consequences for private enterprise. While the changing nature of the marketplace has significantly altered the position of private sector firms vis-a-vis their government competitors, few rules have been formulated to deal with this new reality. The need to enforce constitutional limits upon unfair government enterprise activity is thus one of overriding national importance. In the absence of such limits sovereign powers can be exercised to aid government enterprise unfairly at the direct expense of private sector competitors.

A. Government At All Levels Is Increasingly Engaged In Commercial-Industrial Activities In Direct Competition With Private Enterprise.

Federal, state and local governments, considered as a unit, constitute by far the most sizeable sector of our economy. In 1973 the combined expenditures by Federal, state and local governments were $448.5 billion

(Federal $264.7 billion, state and local $183.8 billion); measured against a total Gross National Product of $1,220.0 billion for 1973, government expenditures account for 37%. Federal purchases of goods and services together with the production of goods and services by in-house staffs alone totalled $106.9 billion for 1973, approximately 9% of G.N.P.[29]

The current importance of government as an economic unit reflects a significant expansion of government at all levels over the past three decades. Total government employment grew by 230% from 5.9 million to 13.6 million between 1942 and 1972. The growth of government has, contrary to common belief, been much more dramatic at the state and local than at the Federal level. During the 1942 to 1972 period, total employment at these levels expanded by 332%, from 3.3 million to 10.8 million.[30]

This significant expansion in government economic activity has a direct bearing on this case, for a substantial portion constitutes an increase in government enterprise activities carried on in direct competition with the private sector. Such activities take two forms. First, government directly provides a broad range of goods and services to the public. While much government activity in this field lies in such traditional areas of public service as education and police and fire protection, a substantial amount consists of commercial activities carried out in direct competition with private enterprise. Second, government provides numerous goods and services for its own use or for the use of other units of government; such goods and services are all too often provided by in-house govern-

[29] ECONOMIC REPORT OF THE PRESIDENT, FEBRUARY 1974 76, 80 (1974); BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1975 330 (1974).

[30] U.S. DEP'T OF COMMERCE, 1972 CENSUS OF GOVERNMENTS, VOL. 3 (1973).

ment staffs and facilities where adequate and more efficient private sector capability is readily available. The breadth of commercial and industrial activities undertaken by government in these two categories is enormous. The list includes such well-known activities as airports, public transit, parking garages, electric and gas utilities and sanitation. However, it also covers manufacturing (ship repair), construction (dams), wholesale and retail trade (including warehousing and distribution), professional services (e.g., data processing, research and development, planning and consulting services), communications and media activities (e.g., printing, photographic processing) and numerous personal services (e.g., janitorial, landscaping, food service).[31]

Government competition with the private sector is thus an ever-growing phenomenon within our mixed economy, the magnitude and implications of which are only now being appreciated. One commentator has summarized the dramatic change in the government's role in relation to private enterprise as follows:

> Nevertheless, the innovations in the forms of government enterprise during the past several decades have been so varied and pervasive that they almost represent a structural transformation. Under the impact of depression, war, cold war, breakthroughs in nuclear power and in the technology of space, together with the intensification of problems precipitated by industrialization and urbanization, government has been brought face to face with new and demanding problems requiring attention and

[31] The parking industry is illustrative of the significant expansion of government enterprise activities in competition with private enterprise. As of 1972, 6,464 cities operated municipal garages and lots, with a total investment of $5.2 billion. Over two-thirds of a billion dollars investment in facilities and control equipment over the next two years was contemplated. NATIONAL LEAGUE OF CITIES, NATIONAL PARKING FACILITY REPORT 24 (1972).

solution. As our history would have foretold, the response has been largely pragmatic. New departures have been made in enterprise forms as well as in their relations to private and nonprofit sectors, in Federal, state, and local governments. These innovations have resulted in an erosion of many conventional distinctions between the private enterprise and the governmental sector; they have led to the establishment of new joint forms of enterprises involving government and business, government and nonprofit organizations, and various levels of government; finally, they have resulted in a great proliferation of special-purpose public authorities or public corporations.[32]

As a consequence of this dramatic change, it is no longer appropriate to defer blindly to the sovereign when sovereign powers are used to gain an unfair advantage in the marketplace. Where government operates in the marketplace, the related exercise of sovereign powers must be subject to reasonable restraints.

B. Government Enterprise Activities Enjoy Numerous Inherent Competitive Advantages

The need for such restraints is magnified by the inherent competitive advantages over competing private sector firms which government acting in an enterprise capacity enjoys. The governmental entity is normally exempt from Federal and state income taxes; state and local real and personal property taxes; and in most instances excise and sales taxes imposed upon commercial products and services. It is financed through public funds, primarily derived from tax revenues and long-term,

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[32]E. GINZBERG, D. HIESTAND, B. REUBENS, THE PLURALISTIC ECONOMY 34, 35 (1965). *See also* M. WEIDENBAUM, THE MODERN PUBLIC SECTOR: NEW WAYS OF DOING THE GOVERNMENT'S BUSINESS (1969).

low-interest, tax-exempt government financing.[33] In many cases it is eligible for and receives substantial subsidies from a higher level of government. Finally, the government enterprise enjoys numerous other privileges which inhere in the sovereign, such as eminent domain, and is frequently exempt from regulatory requirements imposed upon competing private businesses.

The present case provides a typical illustration of government's competitive advantages. Under the Parking Authority Law enacted by Pennsylvania, all parking authorities within the state are exempt from real and personal property taxes and excise taxes.[34] An exemption from Federal income taxes is provided in §115 of the Internal Revenue Code.[35] Parking authorities are author-

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[33]Revenue from on-street parking meters is another significant source of public funding in the case of municipal parking facilities. In 1972 approximately $135 million (54%) of the $250 million in municipal revenues from parking meters was deposited in special parking funds rather than the general municipal treasury. Such parking funds provide an earmarked source of funds for municipal parking facilities. NATIONAL LEAGUE OF CITIES, NATIONAL PARKING FACILITY REPORT 30 (1972).

[34]PA. STAT. ANN. Tit. 53 §355 (1954); McSorley v. Fitzgerald, 359 Pa. 264, 59 A.2d 142 (1948); County of Allegheny v. Township of Moon, 436 Pa. 54, 258 A.2d 630 (1969).

[35]INT. REV. CODE OF 1954, §115. Amici note that such an exemption from Federal taxes is not constitutionally required where a government carries on commercial-industrial activities in competition with the private sector. *See* New York v. United States, 326 U.S. 572, 582 (1946):

> But so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls only on a State.

See also South Carolina v. United States, 199 U.S. 457 (1905); Ohio v. Helvering, 292 U.S. 360 (1934).

ized to issue bonds of up to forty year maturity, the income from which is exempt from all Pennsylvania taxes and from Federal income taxes.[36] The power of eminent domain is also specifically conferred.[37] As the court below noted, the two factors of tax exemption and low-cost public financing by themselves constitute an unfair competitive advantage.

The favors bestowed upon government enterprise lend it considerably greater flexibility than its private sector counterpart in responding to a business environment in which both must operate. This flexibility creates an enormous potential for anticompetitive and monopolistic actions by government instrumentalities.[38] For example, a government enterprise may take advantage of its privileges to engage in unfair price competition with destructive consequences to its private sector competitors. Having eliminated viable private sector competition, the government enterprise would then become a traditional monopolist. On the other hand, the government firm may choose to maintain competitive price levels and enjoy a large margin of extra profits. Its tax exemptions and other competitive advantages then constitute a subsidy which can be used for specific long-term

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[36]PA. STAT. ANN. Tit. 53 §346, 355; INT. REV. CODE OF 1954, §103.

[37]PA. STAT. ANN. Tit. 53 §349.

[38]There has been considerable analysis of the same fundamental unfairness and adverse economic implications presented here in the closely analogous context of tax-exemptions for charitable organizations engaged in commercial activities. *See* Note, *The Macaroni Monopoly: The Developing Concept of the Unrelated Business Income of Exempt Organization*, 81 HARV. L. REV. 1280 (1968); Note, *Preventing the Operation of Untaxed Business by Tax-Exempt Organizations*, 32 U. CHI. L. REV. 581 (1965); Note, *College Charities, and the Revenue Act of 1950*, 60 YALE L.J. 850 (1951). *See also* R. MUSGRAVE, THE THEORY OF PUBLIC FINANCE 276-286 (1959).

competitive purposes, such as investment in improved physical plant and capital facilities. The eventual adverse impact on competition would be the same.

The instant case illustrates the significant threats to private enterprise posed by the proliferation of government enterprise activities enjoying significant competitive advantages over private business and the need for laws and policies, effectively implemented, which curb government competition with the private sector on an unfair and inequitable basis. The combination of practical limitations upon increasing revenues from such traditional sources of revenue as property taxes and the inherent tendency of an organization, public or private, to seek to expand its operations inevitably moves public enterprise into destructive competition with the private sector. As in the instant case, the legislature which initially authorized this activity never intended such consequences; nevertheless the momentum towards expansion, fueled by unfair competitive advantages and the need for additional government revenues, threatens to eliminate any viable private sector competition. In such circumstances, where the combined impact of government competition and the related exercise of sovereign powers can cause substantial economic harm to competing private sector firms, it is essential that the limitations on arbitrary government action established by the Takings Clause be enforced.

C. Maximum Utilization Of The Resources Of The Private Sector Is In The Public Interest

The principles governing the private enterprise system as we know it in the United States and which have made the United States economy so successful remain valid. The basic principle underlying reliance upon private enterprise is the recognition that the profit motive and

competition in business provide efficiencies which cannot be duplicated readily in the public sector. Private enterprise is the economic system which embodies the greatest promise for providing the general public in the long run with the maximum social and economic benefits. The proper role of government, if the capabilities of our economic system are to be developed to the fullest, is to safeguard the operations of the market and to regulate economic activities where competition is not perfect or is absent or where the market does not adequately account for the value of certain public objectives. It is clearly not the proper role of such a government in conducting its own activities and providing necessary public services to engage in unfair competition with private organizations providing similar services; on the contrary, the government should carry out these activities with a view towards encouraging development of the capabilities of the private sector.

It is well understood that government enterprise creates significant distortions within our tax structure. Since government enterprise is funded through tax dollars, private taxpaying businesses are in effect required to finance their own competition. This is an unintended and fundamentally unfair result. In addition, the expansion by one unit of government into commercial-industrial activities to the detriment of the private sector deprives other levels of government of urgently needed revenues. For example, when a commercial facility is owned by a local government, such property escapes the payment of local taxes, its income is normally exempt from Federal and state income taxes, and its products and services frequently escape excise and similar taxes normally levied on a commercial product. This significant overall revenue loss from government enterprise activities is a cost eventually imposed on taxpayers at all levels of government through higher general tax rates.

The overriding importance of curbing unfair government competition with private enterprise lends broad implications to the specific questions presented in this case. The dissenting justices in the Commonwealth Court, whose position was upheld by the Supreme Court of Pennsylvania, recognized the need to invalidate this excessive and unreasonable tax upon a direct private sector competitor if our national policy of reliance on private enterprise is to have any meaning; otherwise, the ability of government to unfairly compete would be virtually unlimited:

> Under our free enterprise capitalistic system, the government was never intended to enter into competitive private businesses, except as may be justified under its police powers. When this Commonwealth instituted the authority approach to public services, it was never intended as an intentional and direct method of governmental competition with its citizens. Rather, it was intended as a means to circumvent the constitutional limitations on governmental indebtedness, where certain public services were in need of capital investment not otherwise available or provided by private citizens or businesses. Except for matters purely within a governmental function, government should not provide capital and labor to compete with its citizens. To some, who believe in some form of government other than that which we enjoy, the government should take over all businesses affecting the public interest. To them, in Pennsylvania, it would be appropriate for government to take over the steel mills and use government employees to run them, much like that which was done with the retail sale of liquor. Such a philosophical approach does violence to my understanding of our present system of government. Therefore I believe *great caution should be taken to make certain that a competing government does not force the private businesses of*

our citizens out of existence by an arbitrary use of otherwise unrestricted taxing powers.[39]

D. Public Policy Favors Restrictions Upon Unfair Government Competition With the Private Sector

Resolution of the specific issues in this case therefore raises fundamental questions concerning the proper role of government and its instrumentalities as participants in our free enterprise economic system. Government policy makers who have addressed these same issues in other contexts have consistently sought to strike a balance between the public and private sectors which assures reliance upon the private sector to the maximum feasible extent. Were this Court to reverse the decision below and sanction the actions which the City of Pittsburgh has directed at its private sector competitors, it would contravene this important and well-recognized public policy.

1. The Pennsylvania Statute Authorizing Municipal Parking Authorities Specifically Prohibited Unfair Competition by Such Authorities

It is clear that the Pennsylvania legislature, in authorizing municipalities to form parking authorities, never intended that such municipal parking facilities compete to the detriment of private enterprise. The Parking Authority Law specifically provides:

> That it is intended that the authority cooperate with all existing parking facilities so that private enterprise and government may mutually provide

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[39] Alco Parking Corporation v. City of Pittsburgh, 6 Pa. Cmwlth. 433, 449, 450, 291 A.2d 556, 565 (1972) (dissenting) (Emphasis added).

> adequate parking services for the convenience of the public.[40]

During the debates on this measure in the House, Representative Richter, one of the co-sponsors, elaborated upon this intent:

> . . . I do not believe that parking should become strictly a public operation. There are people in private enterprise there now and I believe that they should be permitted to remain there and the government should not take over their facilities and drive them out of business.[41]

This clear intent was violated by the expansion of municipal parking facilities in downtown Pittsburgh with substantial unfair competitive advantages which have worked to the detriment of competing private garages. This same legislative policy magnifies the arbitrary and capricious nature of the selective tax which enhances these unfair competitive advantages.

2. Federal Laws And Policies Limit Unfair Competition With the Private Sector by Government Instrumentalities

Beginning with an extensive study made in 1932 by a Special Committee of the House of Representatives, Congress has addressed the problem of unfair government competition and affirmed the need to curtail such competition in numerous hearings and reports over the last forty years.[42]

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[40]PA. STAT. ANN. Tit. 53, §342(i) (1954).

[41]PA. LEG. JOURNAL 1947, 2094 (House).

[42]The earlier Congressional activity is discussed at length in STAFF OF SENATE COMM. ON GOVERNMENT OPERATIONS, 88TH cong., 1ST sess., GOVERNMENT COMPETITION WITH PRIVATE ENTERPRISE (Comm. Print 1963). Since 1963 there

Much of this concern has focused upon the inadequate utilization of private sector capabilities to provide goods and services for the government's own use. A number of legislative proposals addressing this problem have been deferred in favor of oversight of the ongoing efforts of the Executive Branch to implement a policy of maximum reliance on private enterprise administratively and to fashion fair rules to govern this policy of reliance.

More specifically, in January 1955, the Bureau of the Budget published the first of a series of Bulletins stating a policy of maximum reliance upon private enterprise to provide the government's needs for goods and services. Bureau of Budget Bulletin No. 55-4[43] stated:

> It is the general policy of the administration that the Federal Government will not start or carry on any commercial activity to provide a service or product for its own use if such product or service can be produced from private enterprise through ordinary business channels. Exceptions to this policy shall be made by the head of an agency only where it is not in the public interest to procure such product or service from private enterprise.

Bureau of Budget Bulletin No. 60-2[44] represented a further strengthening of this policy of reliance upon the private sector:

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has been substantial additional Congressional activity which is summarized in Commission on Government Procurement, Study Group # 1 (Utilization of Resources), Final Report, Vol. II (1972).

[43]Bureau of the Budget, Bulletin No. 55-4, Commercial-Industrial Activities of the Government Providing Products or Services for Governmental Use, para. 2 (January 15, 1955).

[44]Bureau of the Budget, Bulletin No. 60-2, Commercial-Industrial Activities of the Government Providing Products or Services for Governmental Use, para. 2, 3 (September 21, 1959).

> It is the general policy of the administration that the Federal Government will not start or carry on any commercial-industrial activity to provide a service or product for its own use if such product or service can be procured from private enterprise through ordinary business channels.

The rationale for this policy was clearly stated:

> Because the private enterprise system is basic to the American economy, the general policy establishes a presumption in favor of government procurement from commercial sources. This has the twofold benefit of furthering the free enterprise system and permitting agencies to concentrate their efforts on their primary objectives.

In stating such a firm policy and narrowly defining those exceptions which would permit in-house performance, this Bulletin sought to articulate a balance between public and private sector activity which so far as possible reserved to the private sector those functions which it could more appropriately perform. This same effort to strike an appropriate balance is reflected in the most current expression of Executive Branch policy, Office of Management and Budget Circular No. A-76,[45] which again establishes specific guidelines:

> in furtherance of the Government's general policy of relying on the private enterprise system to supply its needs.[46]

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[45]Office of Management and Budget, Circular No. A-76, Policies for Acquiring Commercial or Industrial Products and Services for Government Use, para. 2 (Revised August 30, 1967).

[46]The evolution of this policy and several specific examples of its application are set forth more fully in Wildermuth, *Contracting Out: A Case for Realistic Contract vs. In-House Decision-Making*, 59 MIL.L.REV. 1 (1970). Inevitably there have been difficulties in the precise application of this general objective to specific situations, bureaucratic recalcitrance to take action which would restrain the expansion of the bureaucracy, and resistance from

In 1968, the Congress gave specific statutory recognition to this policy of reliance on private enterprise in Title III of the Intergovernmental Cooperation Act of 1968[47] which authorized Federal agencies to provide certain technical services to state and local governments. Because many private sector firms are engaged in providing such services to state and local governments, such authorization threatened an increase in unfair government competition with private sector firms. Congress forestalled such a development by specifically limiting any such Federal activity to areas where there was special competence within the Federal government and an absence of adequate private sector capability; in doing so it stated a basic policy of reliance upon private enterprise:

> Provided, however, that such services shall include only those which the Director of the Office of Management and Budget through rules and regulations determines Federal departments and agencies have special competence to provide. Such rules and regulations shall be consistent with and in furtherance of *the Government's policy of relying on the private enterprise system to provide those services*

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unions of government employees who view the issue from the narrow perspective of job security rather than from the over-riding national interest in maximum reliance upon the competitive private sector. *See* Comp. Gen. Rep. No. B-158685, *Better Controls Needed in Reviewing Selection of In-House or Contract Performance of Support Activities*, March 17, 1972; Comp. Gen. Rep. No. B-158685, *Better Management Needed in Civil Agencies Over Selection of In-House or Contract Performance of Support Activities*, July 31, 1973; U.S. Dep't of Commerce, OMB Circular A-76 Study, January 1972. Nevertheless the continuing efforts of the Executive Branch during every Administration for the last twenty years reflect the fundamental importance attached to this national policy.

[47] 42 U.S.C. §4221 ff (1970 ed.).

which are reasonably and expeditiously available through ordinary business channels.[48]

In 1969 Congress created a Commission on Government Procurement to review government procurement laws and policies. In establishing this Commission, Congress declared its policy "to promote economy, efficiency and effectiveness in the procurement of goods, services and facilities by and for the Executive Branch of the Federal Government by:

> minimizing possible disruptive effects of Government procurement on particular industries, areas, or occupations;
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> * * *
>
> promoting fair dealing and equitable relationships among the parties in Government contracting.[49]

The Commission's report to Congress, issued December 1972, reviews the Government's policy of reliance on private enterprise and the lengthy history of Congressional and Executive Branch efforts to develop and implement an effective "make-or-buy" policy. It recommends that there should be an even clearer expression in the law of the Government's policy for relying on the private sector for goods and services.[50] In the current

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[48] 42 U.S.C. §4225 (1970 ed.) (Emphasis added). The pertinent regulations are set forth in Office of Management and Budget, Circular No. A-97, Rules and Regulations permitting Federal agencies to provide specialized or technical services to State and local units of government under Title III of the Intergovernmental Cooperation Act of 1968 (August 29, 1969), which establishes a condition that the requesting government "certify that such services cannot be procured reasonably and expeditiously by it through ordinary business channels."

[49] Act of November 26, 1969, Pub.L. No. 91-129, §§1(9), 1(11), 83 Stat. 269.

[50] COMMISSION ON GOVERNMENT PROCUREMENT, FINAL REPORT, VOL. I 57 (1972) (Recommendation 22).

Congress, concern for elaboration and further development of this fundamental policy continues. For example, a bill recently passed by the Senate would establish an Office of Federal Procurement Policy, whose responsibilities include:

> monitoring and revising as necessary policies and regulations concerning the role of the Federal Government and its reliance on the private sector in providing goods and services required to meet public needs.[51]

The stated objective for conferring this power is that:

> Giving the OFPP the function of monitoring and revising, as necessary, executive directives implementing this national policy will enhance its observance and assure more positive implementation.[52]

Congressional concern for limiting unfair competition is evident in other areas. Similar problems of unfair competition are presented where a tax-exempt not-for-profit organization engages in commercial or industrial activities in competition with private sector firms. Congress has sought to eliminate this unfair competition by requiring the not-for-profit organization to pay taxes upon net income from such "unrelated business" activity.[53] The rationale of this tax on unrelated business income has been explained as follows:

> The problem at which the tax on unrelated business income is directed is primarily that of unfair competition. The tax-free status of these . . . organizations enables them to use their profits tax-free to expand operations, while their competitors can

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[51] S. 2510, 93rd Cong., 2d Sess. §6(c)(1)(1974).

[52] S.Rep. No. 93-692, 93d Cong., 2d Sess. 19 (1974).

[53] INT. REV. CODE OF 1954, §§511ff

expand only with their profits remaining after taxes.[54]

Significantly, Congress in the Revenue Act of 1951[55] specifically expanded this tax to cover unfair competition by publicly-supported educational institutions:

> . . . the present provision does not apply to such income of State universities and other schools of governmental units. It has been called to the attention of your committee that some State schools are engaging in unrelated activities and "lease-backs" which would be taxable if they were not a State or its instrumentality. *It is clear that the same opportunities for unfair competitive advantage exist* in connection with these activities of State universities as with respect to similar activities of other educational institutions.[56]

This Congressional and Executive Branch activity represents an ongoing effort to implement laws and policies which limit unfair government competition with the private sector. This effort proceeds from a basic premise that, within our free enterprise economic system, it is not appropriate for a government instrumentality to compete unfairly in providing products or services where adequate private sector capability exists. This same fundamental policy is directly relevant to this Court's interpretation and application of pertinent constitutional restraints upon government action.

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[54]H.R. Rep. No. 2319, 81st Cong., 2d Sess., 1950-2 CUM.BULL. 380, 409 (1950); *See also* S.Rep. No. 2375, 81st Cong., 2d Sess., 1950-2 CUM.BULL. 483, 505 (1950).

[55]Act of October 20, 1951, ch. 521, §339, 65 Stat. 452, *codified at* INT. REV. CODE OF 1954, §511(a)(2)(B).

[56]S.Rep. No. 781, 82nd Cong., 1st Sess., 1951-2 CUM.BULL. 458, 578 (1951) (Emphasis added).

E. This Court Has Recognized the Need to Curb Adverse Competitive Impacts Flowing From Government Action

Recent decisions of this Court and of the lower Federal courts concerning the standing of a competitor to challenge government action which adversely affects its competitive posture and the application of the antitrust laws to certain commercial activities in which the government is a participant recognize the need for courts to scrutinize and curtail government actions with an adverse impact upon competition. The instant case presents such government action, and the competitive effects of that action must, as the court below recognized, be taken into account in determining whether an unconstitutional taking has occurred.

1. An Injured Competitor Has Standing to Challenge Government Action

This Court, by enabling a competitor more readily to challenge governmental action which works to its competitive detriment, has established the important responsibility of the judiciary to assess the adverse competitive impacts of government action.

The expanded judicial role in this area is aptly illustrated by a comparison of two decisions of this Court concerning the paradigm of government enterprise activity, the Tennessee Valley Authority. *Tennessee Electric Power Co. v. T. V. A.*[57] is typical of numerous rulings of an earlier era which took a narrow view of the judicial function. In *Tennessee Electric Power* several private electric power companies operating within the geographic area to be served by the Tennessee Valley Authority's electricity generation and distribution facili-

[57] 306 U.S. 118 (1939).

ties brough suit to enjoin these operations, claiming that the Act creating the Authority was unconstitutional. Although the Court recognized that the T.V.A. would be "in direct competition with the appellants' enterprises through the sale of power to industries in areas now served by them or which they can serve by expansion of their facilities,"[58] it held that these private sector competitors had no standing to maintain the action.[59]

Thirty years later, in *Hardin v. Kentucky Utilities*,[60] this Court reached the opposite conclusion in factual circumstances substantially similar to those presented in *Tennessee Electric Power*. Kentucky Utilities Company brought suit to enjoin an expansion of the T.V.A. service area into a locale formerly served primarily by Kentucky Utilities. This Court rejected the argument, based upon the earlier decision in *Tennessee Electric Power*, that Kentucky Utilities lacked standing, distinguishing that prior decision on the basis of intervening Congressional action reflecting a clear intent to protect private utility companies from unfair T.V.A. competition.[61] Thus a private sector firm alleging injury from the unfair and illegal competition of a government instrumentality was held entitled to judicial review of the legality of that competition.

Subsequently, in *Association of Data Processing Service Organizations v. Camp*,[62] this Court specifically

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[58]306 U.S. at 137.

[59]Significantly this decision relied in part upon Puget Sound Power and Light Co. v. Seattle, 291 U.S. 619 (1934), which petitioner City of Pittsburgh has advanced as the primary authority for disregarding the effects of government competition. *See* 306 U.S. at 139 n. 9; Brief for Petitioner at 31.

[60]390 U.S. 1 (1968).

[61]390 U.S. at 5, 7.

[62]397 U.S. 150 (1970).

rejected the standards established by *Tennessee Electric Power* in favor of a more liberalized test of standing. *Data Processing* involved a suit by a national organization of data processing service organizations and several individual data processing firms challenging a ruling by the Comptroller of the Currency permitting national banks to provide data processing services to other banks and to bank customers in competition with the petitioners. In holding that this potential injury to the competitive position of the data processing service organizations constituted a basis for challenging the Comptroller's action, this decision significantly expanded the circumstances in which a competitor may challenge government action and correspondingly endorsed increased involvement of the judiciary in assessing the impact of government action upon competition.[63]

One significant effect of this Court's liberalization of the standing doctrine is to require judicial review of a broad range of government actions which enhance unfair government competition with private enterprise. *See Hardin v. Kentucky Utilities.*[64] For example, in *Air Reduction Company v. Hickel*[65] several private sector producers and distributors of helium brought suit to enjoin enforcement of Interior Department regulations which barred them from selling helium to any government contractor. Under the regulations government contractors were permitted to purchase their requirements of helium solely from the Interior Department's helium program, which operated in competition with these private sector firms. The court held that these private sector competitors had the requisite standing since the regulations "would interfere with appellant's

[63] *See also* the companion decision in Barlow v. Collins, 397 U.S. 159 (1970).

[64] 390 U.S. 1 (1968).

[65] 420 F.2d 592 (D.C.Cir. 1969).

existing beneficial business relations with Government contractors"[66] and further held the regulations invalid as exceeding the authority conferred upon the Secretary. In addition to such scrutiny of direct government competition Federal courts, under the *Data Processing* doctrine, are now in a position to review the competitive impact of such actions as disposition of government property, *Nuclear Data, Inc. v. Atomic Energy Comm'n*,[67] (grant of exclusive patent rights), and of government procurement, *Scanwell Laboratories, Inc. v. Shaffer*.[68] Similarly complaints by unions of government employees concerning competition from the private sector have been entertained. *National Ass'n of Letter Car. v. Independent Postal System*.[69]

The common thread of these decisions is a recognition of the important role performed by the judiciary in protecting private sector firms from the adverse competitive impact of government actions. Collectively they constitute an overwhelming rejection of petitioner City of Pittsburgh's contention that such a judicial role "threatens to destroy the ability of government to serve the public."[70]

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[66]420 F.2d at 594.

[67]344 F.Supp. 719 (D.Ill. 1972).

[68]424 F.2d 859 (D.C. Cir. 1970).

[69]470 F.2d 265 (10 Cir. 1972). This specific issue is currently before the court in American Post. Wkrs. U., Detroit v. Independent Post. Sys., 481 F.2d 90 (6 Cir. 1973), *cert. granted* 94 S.Ct. 839 (1973).

[70]Brief for Petitioner at 32.

2. *Federal Antitrust Law Limits Adverse Competitive Impacts Deriving From Government Enterprise Activities*

This court, in *Parker v. Brown*[71], held as a matter of statutory construction that certain government regulatory activities were not subject to the Sherman Act.[72] Similarly, under the so-called *Noerr* doctrine[73] this Court has recognized that anticompetitive practices by private parties are, under certain circumstances, entitled to First Amendment protection where they involve efforts to influence government policy making functions. This Court has made clear from the beginning, however, that this latter exemption from the Sherman Act did not extend to anticompetitive practices where the government involvement was of a commercial rather than policy making nature. To hold otherwise would contravene the "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade",[74] which represents a "fundamental national economic policy."[75] Thus in *Continental Ore Co. v.*

[71]317 U.S. 341 (1943).

[72]15 U.S.C. §1 ff (1970 ed.). While some lower court decisions have expanded the Parker exemption to direct government participation in the marketplace, this Court has never directly addressed that issue. In view of this Court's repeated insistence that exemptions from the antitrust laws be strictly construed, Federal Maritime Comm'n v. Seatrain Ltd., 93 S.Ct. 1773 (1973), Otter Tail Power Co. v. U.S., 93 S.Ct. 1523 (1973), there is considerable question as to the validity of such an expansive interpretation of the Parker doctrine.

[73]Eastern Railroad President's Conference v. Noerr Motor Freight Inc., 365 U.S. 127 (1961).

[74]Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

[75]Gulf States Utility Co. v. F.P.C., 93 S.Ct. 1870, 1878 (1973).

Union Carbide Corp.[76] this Court held that the defendant's status as the duly authorized exclusive purchasing and distribution agent of the Canadian government for all Canadian wartime requirements of vanadium did not immunize from antitrust scrutiny its alleged exclusion of the plaintiff, a vanadium producer, from the Canadian market. The policies and strictures of the Sherman Act were held applicable to such anticompetitive practices even though conducted under the aegis of discretionary authority conferred by the Canadian government:

> In this case respondent's conduct is wholly dissimilar to that of the defendant's in Noerr. Respondents were engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws. To subject them to liability under the Sherman Act by eliminating a competitor from the Canadian market by exercise of the discretionary power conferred upon Electro Met of Canada by the Canadian Government would not remotely infringe upon any of the constitutionally protected freedoms spoken of in Noerr.[77]

See also California Motor Transport v. Trucking Unlimited where the Court cited *Continental Ore* with approval for the proposition that "Conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression."[78]

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[76]370 U.S. 690 (1962).

[77]370 U.S. at 708.

[78]404 U.S. 508, 513 (1972). This decision is also significant in that it made substantial inroads into the blanket immunity established by Noerr for attempts to influence government policy determinations, holding that this immunity did not extend to a campaign to restrict the free and unlimited access of one's competitors to government tribunals. This restriction of Noerr reflects this Court's concern for narrowing so far as possible any exceptions to the basic policy established by the Sherman Act.

Subsequent decisions of the lower Federal courts have further articulated this distinction between government policy making and government enterprise functions. In applying the Federal antitrust laws to private actions intertwined with the latter, the courts have emphasized the significant economic importance of government acting as an economic unit and the serious potential threats to competition presented if such activities were totally immune from judicial restraint.[79] In *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*[80] the court held that an alleged conspiracy to influence public purchasing officials to adopt the defendant's proprietary

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[79]*See* Note, *Application of the Sherman Act to Attempts to Influence Government Action*, 81 HARV.L.REV. 847, 851, 852 (1968).

> In 1966, federal, state and local governments spent over 150 billion dollars, about one-fifth of the gross national product, in the purchase of goods and services. No unit that purchases over one-tenth of the GNP, as does the federal government alone, is just another buyer, but in many transactions governments behave much like other large economic units. Whenever a government is victimized by trade restraints, all those who must finance its expenditures are injured also; and the consequent misallocation of resources in the economy as a whole may be quite severe. When directly participating in the economy as an individual economic unit, a government can best advance the public's interest in economy and efficiency by responding to the economic signals of a properly functioning market. Only then can it be certain that it is able to maximize the utility of its expenditures. Moreover, since governments purchase such a large portion of the gross national product, employing the Sherman Act to require of those who deal with government the same standards of conduct as those prescribed for dealings with other economic units could significantly advance the Act's policy of promoting a competitive market in the national economy.

[80]424 F.2d 25 (1st Cir.), *cert. den.* 400 U.S. 850 (1970).

specifications for pipeless swimming pools was subject to the Sherman Act. Even though the market for such swimming pools involved almost exclusively "public bodies or private bodies using public funds"[81] the court rejected the blanket argument that any restraint of trade resulting from valid governmental action or efforts to influence the same was immune from the Federal antitrust laws and remanded the case for trial:

> We hold only that the legality of Paddock's selling methods is to be judged without regard to whether its customer is a private consumer or a public official acting under a competitive bidding statute. Those who sell to private developers under competitive bidding procedures have never enjoyed antitrust immunity. We doubt whether applying the same standard to dealings with public customers will prompt a wholesale repudiation of contracts or hamstring the efforts of public bodies to buy desirable products. On the other hand, we think that such an even-handed rule will promote the policy of free and unfettered competition which underlies the Sherman Act. Government is the largest single customer in our economy, with expenditures amounting to over $150 billion in 1966.
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> * * * * *
>
> To hold that Paddock's conduct is exempt in such circumstances would be tantamount to a grant of total immunity for commercial dealings with the government. Our national reliance on the market to efficiently allocate resources would be misplaced if dealings with the nation's largest customer were totally exempt. We therefore hold that efforts to influence government officials acting under statutes requiring competitive bidding are within the scope of the antitrust laws.[82]

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[81] 424 F.2d at 27.

[82] 424 F.2d at 34 (Footnotes omitted).

Similarly, in *Hecht v. Pro-Football, Inc.*[83] the court, relying upon the *Continental Ore* and *Paddock Pool* decisions, held that a stadium lease between the D.C. Armory Board and a professional football team incorporating a restrictive covenant prohibiting use of the stadium by any professional football team other than the lessee "must be tested in accordance with the United States antitrust laws as usually applied to contracts between private parties."[84]

We do not argue that the City of Pittsburgh's action in the instant case should be held subject to the antitrust laws; we assume for the present that as a governmental body, the city remains immune from damage actions based upon the Sherman Act under the doctrine of *Parker v. Brown.*[85] The present cause of action is founded upon the Takings Clause, however, which clearly does apply to the actions of government and its instrumentalities. We submit that the judicial concern for the adverse competitive impacts where government acts in an enterprise capacity reflected in these antitrust decisions is, as the court below quite properly noted, equally relevant in interpreting the Takings Clause:

> This governmental enterprise competing with private enterprise adds not only a new and most significant dimension to the traditional constitutional problem

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[83]444 F.2d 931 (D.C. Cir. 1971).

[84]444 F.2d at 947. *See also* Israel v. Baxter Laboratories, Inc., 466 F.2d 272 (D.C. Cir. 1972); Woods Exploration and Producing Co., Inc. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), *cert. den.* 404 U.S. 1047 (1972), where the court noted that:

> The policies of the Sherman Act should not be sacrificed simply because defendants employ governmental processes to accomplish anti-competitive means. Otherwise, with governmental activities abounding about us, government could engineer many to antitrust havens.

438 F.2d at 1296, 1297.

[85]317 U.S. 341 (1943).

of what constitutes a taking without due process, but also an impermissible one.[86]

III.

AN UNCONSTITUTIONAL TAKING OCCURS WHERE GOVERNMENT ENHANCES ITS COMPETITIVE POSITION BY LEVYING A TAX CAUSING SUBSTANTIAL ECONOMIC HARM TO ITS DIRECT PRIVATE SECTOR COMPETITORS

The Takings Clause establishes standards of fairness and justice proscribing government action which arbitrarily and selectively imposes burdens upon particular persons. In *National Board of Y.M.C.A. v. United States,*[87] this fundamental Constitutional protection was described as follows:

> The Just Compensation Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40 (1960); see also United States v. Sponenbarger, 308 U.S. 256, 260 (1939)[2]

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[2]For a general discussion of the purposes of the Just Compensation Clause, see Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967); Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964). (Footnote by the Court).

The Takings Clause thus presents a bar where government, acting for its own advantage, imposes a substantial economic burden upon a select group of individuals or firms in the private sector. For example, in *Armstrong v.*

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[86]307 A.2d at 864.

[87]395 U.S. 85 (1969).

United States,[88] the United States, by taking title to certain unfinished vessels and related material following a contractor's default, rendered unenforceable materialmen's liens held by suppliers of the contractor. The Court held that this selective burden imposed upon the materialmen was a compensable taking, emphasizing that "the Government was the direct, positive beneficiary."[89] Similarly, this Court has ruled that the Takings Clause prohibits an exercise of government regulatory powers which would require a business to continue operations at a loss, even though continued operation would serve the public interest. Thus in *Brooks-Scanlon v. R.R. Comm'n*,[90] this Court rejected the argument that a regulatory commission could constitutionally compel a company to continue unprofitable operations of a railroad subsidiary indefinitely:

> A carrier cannot be compelled to carry on even a branch of a business at a loss, much less the whole business of carriage.

Railroad Comm'n v. Eastern Texas R.R.[91] is to the same effect:

> To compel it to go on at a loss or to give up the salvage value would be to take its property without . . . just compensation. . . .

These cases reflect the same prohibition against government action which would have the effect of sacrificing

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[88]364 U.S. 40 (1960).

[89]360 U.S. at 49.

[90]251 U.S. 396, 399 (1920).

[91]264 U.S. 79, 85 (1924). *See also* City of New York v. United States, 337 F.Supp. 150 (E.D.N.Y. 1972); *In re* New York, New Haven & Hartford Railroad Co., 330 F.Supp. 131 (D.Conn. 1971); Note, *Takings and the Public Interest in Railroad Reorganization*, 82 YALE L.J. 1004 (1973).

the profits of a select group of individuals or companies in the interest of a so-called "public benefit."

This fundamental principle underpinning the Takings Clause has been articulated thoroughly by Professor Joseph Sax in *Takings and the Police Power.*[92] Professor Sax notes that the Takings Clause was drafted out of a concern for government action appropriating private property for use in public enterprise activity. Without a requirement of compensation, it was feared there would be too great a danger of arbitrary action favoring public enterprise at the direct expense of private individuals. Thus he notes Sir George Tucker's following observation:

> That (provision) which declares that private property shall not be taken for public use without just compensation, was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatever.[93]

The severe tax burden which Pittsburgh has selectively imposed upon its direct competitors under circumstances which substantially eliminate their profitability and thus enhance its own competitive position is thus a government action squarely within the proscription of the Takings Clause. Professor Sax's discussion of the proper analysis of such a selective and burdensome taxing measure under the Takings Clause merits quotation at some length:

> Likewise, it is recognized that every tax technically fits the description of a taking as formulated

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[92]74 YALE L.J. 36 (1964).

[93]74 YALE L.J. at 58 (Quoting from TUCKER'S BLACKSTONE, COMMENTARIES 305-06 (appendix) (1803)).

here (just as it does, incidentally, under the old Harlan invasion theory). But here, too, the temptation to turn the proposed rule into an intellectual plaything must yield to an attempt to find workable rules for a real world. *Of course a government act is not immunized from the compensation provision of the Constitution merely because it has been labelled a tax.* But most taxes are not takings because they incorporate precisely the goal which the compensation rule is designed to achieve: they spread the cost of operating the governmental apparatus throughout the society rather than imposing it upon some small segment of it. Once that cost has been broadly diffused, though perhaps not to every member of the society nor to each in identical amount, it would seem that the essential problem of the taking provision, as delineated earlier, would be overcome.

With these perspectives in mind, it should be possible to approach the problem fruitfully. In essence, a court ought to ask itself these questions: first, does this case raise the sort of issue with which the taking provision was designed to deal; that is, does it present a case of essentially individualized cost-bearing of some public improvement? If the answer to this question is no, as it is with most tax measures, then the constitutional issue may be dismissed forthwith. Second, is some privilege being invoked which must be recognized as an exception to the compensation rule, such as the right to impose fines in a criminal proceeding? Unless the answer here is yes, we must then go on to ask the last question: is the loss incurred here a consequence of resource-acquisition by a governmental enterprise? The response to that final question should determine the issue of compensation.[94]

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[94] 74 YALE L.J. at 75, 76. (Emphasis added).

This prescient analysis specifically anticipated the issues here presented and demonstrates the unconstitutionality of this tax. First, this gross receipts tax selectively imposed upon commercial parking garage operators is not broadly diffused; in the context of favored competition at lower rates from the Parking Authority which prevents the commercial operators from passing the burden on to customers, this gross receipts tax imposes the very "individualized cost-bearing" which the Takings Clause proscribes. Nor does Pittsburgh purport to invoke any public right or other recognized exception from the compensation rule, other than a non-existent exception for revenue measures. Finally, it is clear that the detriment imposed upon the parking garages flows directly from the favored direct competition of a government enterprise, the Parking Authority. As Professor Sax has noted, this "should determine the issue of compensation."

A brief review of the operative facts presented in this case demonstrates the devastating impact of the Parking Tax Ordinance in the presence of favored direct competition from the Parking Authority.[95] The private parking industry in Pittsburgh sustained substantial operating losses after the enactment of this 20% gross receipts tax in 1970. These losses could not be mitigated through increased rates; as the Commonwealth Court found

> The appellants are unable to pass the tax on to customers, not only because customers cannot and will not pay higher rates but also because the appellants are in competition with a public

[95] Amici base this review upon the unanimous findings of the Commonwealth Court, which noted that the relevant findings were based on "undisputed evidence." 291 A.2d at 560, 561.

authority which, exempt from other taxes, can charge less.[96]

Absent judicial relief, the necessary effect of the Parking Tax Ordinance would have been to force a significant number of commercial operators in the City of Pittsburgh out of business.[97] This significant reduction in competition from the private sector would redound to the direct benefit of the Parking Authority, leaving it with significantly enhanced control over the relevant market. This is precisely the circumstance in which, if private enterprise is to survive in the face of government competition, the Takings Clause must be construed to require compensation.

CONCLUSION

Amici have sought to demonstrate that invalidation of this selective and excessive tax, in addition to remedying the fundamental unfairness with which the City of Pittsburgh has treated its private sector competitors, will set an important and necessary precedent limiting the abuse of sovereign powers to gain unfair competitive advantage for government enterprise.

In view of the competition between government and the private sector which pervades our economy, a decision upholding this tax would portend serious consequences for all private sector firms confronted with unfair government competition. Our national policy against such unfair competition with the private sector thus requires that this tax be struck down.

The Takings Clause bars arbitrary government action which selectively imposes excessive burdens upon parti-

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[96] 291 A.2d at 561.

[97] City of Pittsburgh Ordinance No. 30 of 1973, effective April 1, 1973, replaced the gross receipts tax upon the operators with an excise tax upon the patron of the parking facility. This latter tax is not at issue in the instant suit.

cular persons for the government's own benefit. In the context of direct and favored competition from the Parking Authority, this is precisely the effect of the 20% gross receipts tax imposed by the City of Pittsburgh.

Accordingly, amici respectfully submit that this tax must be found unconstitutional.

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CITY OF PITTSBURGH *v.* ALCO PARKING CORP. ET AL.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

No. 73-582. Argued April 15, 1974—Decided June 10, 1974

Respondent operators of offstreet parking facilities in Pittsburgh, Pa., sued to enjoin the enforcement of a city ordinance imposing an increased 20% tax on the gross receipts from parking or storing automobiles at nonresidential parking places, alleging, *inter alia*, that the ordinance was invalid under the Due Process Clause of the Fourteenth Amendment. The lower courts sustained the ordinance, but the Pennsylvania Supreme Court invalidated it on the ground that the tax was so unreasonably high and burdensome that, in the context of competition from public lots operated by the city parking authority, which enjoyed certain tax exemptions and other advantages, the ordinance had the "effect" of an uncompensated taking of property contrary to the Due Process Clause. *Held:* The ordinance is not unconstitutional, and the city was constitutionally entitled to put the automobile parker to the choice of using other transportation or paying the increased tax. Pp. 4–10.

(a) The fact that a tax is so excessive as to render a business unprofitable or even threaten its existence furnishes no ground for holding the tax unconstitutional, *Magnano Co.* v. *Hamilton*, 292 U. S. 40; *Alaska Fish Co.* v. *Smith*, 255 U. S. 44, and the judiciary should not infer from such fact, alone, a legislative attempt to exercise a forbidden power in the form of a seeming tax. Pp. 4–7.

(b) The ordinance does not lose its character as a tax or revenue-raising measure and may not be invalidated as too burdensome under the Due Process Clause merely because the taxing authority, directly or through an instrumentality enjoying various forms of tax exemption, competes with the taxpayer in a manner that the judiciary thinks is unfair, since the Due Process Clause does not demand of or permit the judiciary to undertake to separate burdensome and nonburdensome taxes or to oversee the terms and cir-